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SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-4941

HARRY URBAN, SR.,
Petitioner,

V.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROSS H. SCOTT
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Dallas, Texas 75201
Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI
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The petitioner, HARRY URBAN, SR., prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceeds on July 9, 1971.

OPINIONS BELOW

The judgment of the United States District Court for the Northern District of Texas appears at Appendix A, Page 1. The opinion of the

United States Court of Appeals for the Fifth Circuit appears at Appendix B, Page 1.

JURISDICTION

This petition for certiorari is filed less than ninety (90) days from the date of the opinion of the United States Court of Appeals for the Fifth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

Assessments were made by the Internal Revenue Service against the petitioner under the so-called gambling tax, 26 U.S.C., Sec. 4401 and Sec. 4411. Petitioner takes the position that such taxes are unconstitutional.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF FACTS

The assessments in question were made on October 10, 1969, and cover from April 1, 1966, through September 30, 1966. More than three years had elapsed from the date of the assessment periods when the assessment was levied. The assessments were arbitrary and capricious and were not based on any reasonable fact basis and no return for the periods in question were filed by the petitioner.

REASONS FOR GRANTING THE WRIT

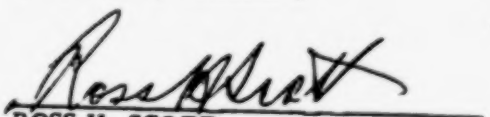
The assessments levied placed the petitioner in the impossible position of either being forced to testify in violation of his constitutional rights in order to contest the amounts or suffering his property and money to be extracted from him by the Internal Revenue Service. It is not consistent or rational to collect a tax with no legal requirement that a return be filed. This Court has not held in a case involving the collection of the tax that such assessment and collection was or is constitutional. It is true that Grosso v. United States, 390 U.S. 62, and Marchetti v. United States, 390 U.S. 39, contained pure dictum that the Court was not holding that the government could not collect the tax. The question of the collectibility of the tax was not before the Court in those cases. The Court handed down its opinion on or about April 5, 1971, in The United States v. United States Coin and Currency in which opinion this Court concluded that since the requiring of the filing of the tax returns was unconstitutional, the confiscation of money to apply on assessments was substantial punishment and that the money seized should be returned to the taxpayer. The opinion of the United States Court of Appeals for the Fifth Circuit does not properly construe the holding of this Court in the Coin and Currency case as the Internal Revenue Service was not attempting to do anything against the Coin and Currency except confiscate the money and apply on tax assessments rather than confiscating the money.

The Court of Appeals for the Fifth Circuit also indicated in this case a lack of clear thinking in their opinion in that they state that "The logical extension of the taxpayer's argument would defeat the imposition of a tax on income derived from illegal sources". The petitioner does not take the position that if he had a net income on wagering, he would not owe income tax thereon.

CONCLUSIONS

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

HARRY URBAN, SR., Plaintiff,	
V.	CIVIL NO. CA-3-3793-A
UNITED STATES OF AMERICA, Defendant.	

JUDGMENT

This action came on for hearing before the Court, Honorable Joe E. Estes, District Judge, presiding, and the issues having been duly heard and all facts having been stipulated, and a decision having been duly rendered, and findings of fact, and conclusions of Law having been made and filed;

It is ORDERED AND ADJUDGED that Plaintiff, Harry Urban, Sr., take nothing, that the action be dismissed on the merits, and that the Defendant, United States of America, recover of the plaintiff its costs of action.

DATED at Dallas, Texas, this 21st day of January, 1971.

/s/ JOE E. ESTES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ ROSS H. SCOTT
Ross H. Scott
2715 Mercantile Bank Building
Dallas, Texas 75201
ATTORNEY FOR PLAINTIFF,

/s/ JERRY A. WELLS
Jerry A. Wells
Tax Division
Department of Justice
Room 7A06, Federal Building
Fort Worth, Texas 76102
ATTORNEY FOR DEFENDANT.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1535
Summary Calendar*

HARRY URBAN, SR.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

(July 9, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: The appealing taxpayer challenges the constitutionality of assessments of the wagering

*Rule 18, 5th Cir.; *see Isbell Enterprises v. Citizens Casualty Co. of N.Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

excise tax, 26 U.S.C.A. § 4401.[1] and the wagering occupational tax, 26 U.S.C.A. § 4411.[2] As we perceive taxpayer's argument, he relies on *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and *United States v. U.S. Coin & Currency*, ___ U.S. ___, 91 S.Ct. 1041, ___ L.Ed.2d ___ (1971) to invalidate these statutes on self-incrimination grounds.

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[1] § 4401. Imposition of tax

(a) Wagers. — There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager. — In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax. — Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. Aug. 16, 1954, c. 736, 68A Stat. 525; Sept. 2, 1958, Pub.L. 85-859, Title I, § 151(a), 72 Stat. 1304.

[2] § 4411. Imposition of tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, c. 736, 68A Stat. 527.

His contention is reasoned as follows: The Secretary is required to make assessments of the correct tax due under the above statutes. The taxpayer must pay the disputed tax assessment and then brings a refund suit to recover the payment. In such a refund suit, the burden of proof is on the taxpayer to prove the exact amount of tax due and owing. This impales the taxpayer on the horns of a dilemma since he can incriminate himself in attempting to meet his burden of proof or he must default the amount of the assessed tax. This is tantamount to compelling the taxpayer to incriminate himself for his illegal activities.

The Supreme Court in *Marchetti* and *Grosso* held that a proper claim of the privilege against self-incrimination precluded a *criminal conviction* for failure to pay the occupational tax (§ 4411) or to fulfill the registration requirements (§ 4412) or to pay the 10 per cent excise tax (§ 4401). Neither case held that the civil liabilities for tax debts were constitutionally impermissible. In fact, the Court in footnote 7 of the *Grosso* opinion indicated in dictum that it would not accept the taxpayer's argument in this case.[3]

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[3]Section 4411 provides that the occupational tax must be paid "by each person who is liable for tax under section 4401" and by each person who receives wagers for one liable under § 4401. It might therefore be argued that since petitioner is entitled to claim the constitutional privilege in defense of a prosecution for willful failure to pay the excise tax, he is thereby freed from liability for the occupational tax. We cannot accept such an argument. We do not hold today either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation: we hold only that such a claim of privilege precludes a criminal conviction premised on failure to pay the tax.

The *Coin & Currency* case provides no comfort to the taxpayer either. It merely held that the forfeiture provisions of Section 7302 of the Internal Revenue Code violated the self-incrimination clause of the Fifth Amendment. Section 7302 authorized confiscation of "any property intended for use in violating the provisions of the internal revenue laws". This case, however, is not concerned with the confiscation of all wagers the taxpayer has received. Rather, it only imposes a 10 per cent tax on such wagers. This tax can in no reasonable way be equated with a forfeit penalty upon those involved in a criminal enterprise such as was condemned in *Coin & Currency*. The logical extension of the taxpayer's argument would defeat the imposition of a tax on income derived from illegal sources whenever a criminal chose to interpose a Fifth Amendment plea. *Cf. James v. United States*, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961); *Rutkin v. United States*, 343 U.S. 130, 72 S.Ct. 571, 96 L.Ed. 833 (1952). Additionally, the Court in *Coin & Currency* strengthened its dictum in *Grosso* with the following statement. "In those cases [*Grosso* and *Marchetti*], we took pains to make it clear that the Court in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities. It was only the method Congress had adopted in collecting the tax that raised the Fifth Amendment question." ____ U.S. at ____, 91 S.Ct .at 1043, ____ L.Ed.2d at ____.

Finally, it is doubtful in this case that the taxpayer was in any danger of incriminating himself. Under the *Grosso* and *Marchetti* decisions, he certainly could not

have been prosecuted by the United States. It would also appear that the State of Texas would be barred from prosecution by the statute of limitations. *See Tex.* Code Crim. Proc. Ann. art. 12.04 (1966).

For the foregoing reasons, the judgment of the District Court is hereby

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-494

HARRY URBAN, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioner filed a refund suit in the district court challenging the Commissioner of Internal Revenue's assessment of wagering taxes under Sections 4401(a) and 4411 of the Internal Revenue Code of 1954. While the petition alleges (p. 2) that the assessment was arbitrary and "not based on any reasonable fact basis," both the pretrial order and the findings of the district court (R. 87, 102) [1] recite that

[1] "R." references are to the appendix filed in the court of appeals.

there were no contested issues of fact and that the sole question presented by petitioner was the constitutionality of Sections 4401 and 4411, *supra*. Both the district court (Pet. App. A) and the court below (Pet. App. B) correctly rejected petitioner's contention as to the invalidity of the statute.

In support of his contention that the wagering tax statutes are unconstitutional, petitioner argues that to defend against the assessment he must testify and therefore incriminate himself; that it is inconsistent and irrational to collect a tax upon which no return need be filed; and that this Court's decisions in *Grosso* v. *United States*, 390 U.S. 62; *Marchetti* v. *United States*, 390 U.S. 39; and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, support his contentions.

The court of appeals correctly held that *Grosso*, *Marchetti*, and *Coin & Currency*, *supra*, do not require reversal of the purely civil judgment involved in this case. This Court held in *Marchetti*, *Grosso*, and *Coin & Currency* merely that criminal punishment, or sanctions tantamount to criminal punishment (forfeiture), for non-compliance with these laws was inconsistent with the privilege against self-incrimination. In footnote 7 of the *Grosso* opinion (390 U.S. at 69-70), the Court carefully pointed out that it was not holding "that a proper claim of privilege extinguishes liability for taxation," but only that "such a claim of privilege precludes a criminal conviction." Likewise, in *Marchetti* (390 U.S. at 61) the Court emphasized—

> • • • that we do not hold that these wagering tax provisions are as such constitutionally im-

permissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

In *United States* v. *U.S. Coin & Currency, supra*, the Court reaffirmed its position in *Marchetti* and *Grosso* by stating that it "in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities" (401 U.S. at 717). Here, of course, unlike the situation in *Coin & Currency*, the government is seeking no forfeiture, but only to assess and collect taxes. All the other courts of appeals which have passed on the question have resolved the issue in the same way as did the court below. *E.g.*, *Hamilton* v. *United States*, 429 F.2d 427 (C.A. 2); *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), certiorari denied, 402 U.S. 978; *Cole* v. *Cardoza*, 441 F.2d 1337 (C.A. 6); *Collins* v. *Daly*, 437 F.2d 736, 739 (C.A. 7).

Petitioner argues that he can only defend the assessment by incriminating himself. The court below, however, found that the statute of limitations had run against any local gambling prosecutions and that any federal gambling prosecutions would be barred by the *Marchetti* and *Grosso* decisions, *supra*. Furthermore, if the petitioner, in defending against the assessment, were to disclose information alleged to be incriminating, the use of that information could be tested when and if its use in a criminal case is attempted. *United States* v. *Blue*, 384 U.S. 251.[3]

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[3] Petitioner's contention that the court below was confused as to the difference between taxes on income and the excise

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED B. UGAST,
Acting Assistant Attorney General.

JOHN P. BURKE,
JOSEPH H. REITER,
Attorneys.

NOVEMBER 1971.

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taxes on wagering (Pet. 4) is without merit. The court below explicitly pointed out that it was deciding the constitutionality of the wagering tax statutes and not the constitutionality of an income tax on earnings derived from wagers.

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